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SENATE

REPORT
101-471

AMENDING SECTION 28(w) OF THE MINERAL LEASING ACT OF 1920, AS AMENDED, TO REPEAL THE 60-DAY WAITING PERIOD FOR THE GRANTING OF PIPELINE RIGHTS-OF-WAY

SEPTEMBER 21, 1990.—Ordered to be printed

Filed under authority of the order of the Senate of September 20 (legislative day, September 10), 1990

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 3017]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 3017) to amend section 28(w) of the Mineral Leasing Act of 1920, as amended, to repeal the 60-day waiting period for the granting of pipeline rights-of way, having considered the same, reports favorably thereon with amendments and an amendment to the title and recommends that the bill as amended, do pass.

The amendments are as follows:

1. On page 1, line 4, delete "of 1920".
2. On page 2, line 1, delete "of 1920".
3. Amend the title so as to read: "A bill to amend section 28(w) of the Mineral Leasing Act of 1920, as amended, to repeal the 60-day waiting period for the granting of pipeline rights-of-way.".

PURPOSE OF THE MEASURE

The purpose of S. 3017 is to eliminate unnecessary delay in the issuance of rights-of-way for the construction and operation of pipelines that cross federal lands by amending section 28(w)(2) of the Mineral Leasing Act, as amended, to repeal the requirement that no right-of-way for a pipeline 24 or more inches in diameter may be granted until 60 days after the Secretary of the Interior or the appropriate agency head has notified the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources of this intention to grant the right-of-way.

S313-48

BACKGROUND AND NEED

Under section 28(w)(2) of the Mineral Leasing Act, as amended, the Secretary of the Interior or other appropriate agency head may not grant a right-of-way for the construction and operation of a pipeline 24 or more inches in diameter for the transportation of oil, natural gas, synthetic fuels, or any refined product produced therefrom until 60 days after the Secretary or agency head has notified the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources of his intention to grant the right-of-way.

The delay created by this provision can be much longer than 60 calendar days, because under section 28(w)(2) the 60-day period does not include "days on which the House of Representatives or the Senate has adjourned for more than three days." For example, in a case where the Secretary of the Interior provides the House and Senate committees with notice of his intention to grant a right-of-way in late June the waiting period would likely last more than 100 calendar days due to the intervening Independence Day recess and August recess which do not count for purposes of calculating the statutory 60-day period. An even more extreme example would occur where the Secretary provided the committees with notice in late September or early October and the Congress adjourned in mid-October and did not reconvene until January of the following year. In that case it would take at least five months for the statutory waiting period to expire.

Section 28(w)(2) does provide that the House Interior Committee and the Senate Energy Committee may by committee resolution waive the waiting period. This provision, however, has proven unsatisfactory, because the Department of the Interior has in the past stated that it would consider a waiver by committee resolution to be legally ineffective and would wait the full 60 days of Congressional session before granting a right-of-way. In 1985 the then Solicitor of the Department of the Interior provided Senator Johnston with his legal opinion that under the Supreme Court's 1983 invalidation of the legislative veto in *INS v. Chadha* the committee waiver provision of section 28(w)(2) is an unconstitutional legislative veto provision. The Solicitor added that, notwithstanding the invalidity of the waiver provision, the statutory waiting period would still be applicable. The validity of the Solicitor's legal opinion regarding the constitutionality of the waiver provision of section 28(w)(2) has never been tested in court. The Committee disagrees with the Solicitor's 1985 legal opinion.

On July 3, 1990, Senator Johnston wrote to the Secretary of the Interior to request that the Department clarify its position regarding the legal validity of the waiver provision. The Department has responded that it will continue to follow the Solicitor's 1985 legal opinion. The Department continues to treat waivers by committee resolution as legally ineffective. On July 18, 1990, the Senate Energy Committee passed a resolution waiving the period for the Department to grant a right-of-way for El Paso Natural Gas Company to construct and operate a pipeline across the Kofa National Wildlife Refuge in Arizona. The House Interior Committee passed a resolution waiving the waiting for the Kofa Refuge right-of-way on

July 25, 1990. The Department has yet to grant the Kofa Refuge right-of-way. In view of the Department's inaction, the only choice for the Congress, short of amending section 28(w)(2), is legislation passed by both Houses of Congress to authorize the immediate granting of right-of-way for a particular pipeline project notwithstanding the generally applicable statutory waiting period. This is not a practical alternative.

The 60-day waiting period serves no useful purpose. It does not confer additional rights upon parties interested in an agency's consideration of a right-of-way application. It does not, without further action by the full Congress, prevent the Secretary or the agency head from granting right-of-way upon the expiration of the waiting period. Repeal of the 60-day waiting period does not deprive the Congress of notice and the opportunity to act in response to an application for a right-of-way to construct a pipeline that will cross federal lands, because the Secretary or the agency head would remain obligated under section 28(w)(2) to provide the House and Senate committees with notice of the receipt of an application for a right-of-way for a pipeline 24-inches or more in diameter.

While the statutory waiting period under section 28(w)(2) serves no clearly identifiable public policy, it does frustrate the achievement of energy policy goals. First, the waiting period thwarts efforts by the Federal Energy Regulatory Commission to expedite the regulatory approval and construction of new natural gas pipelines. The FERC has attempted to minimize regulatory obstacles to increased competition in the natural gas industry. To this end, the FERC has done its best within the existing statute framework to expedite the certification of new pipeline facilities.

This year, for example, the completion of several pipeline projects designed to increase natural gas deliverability for the upcoming winter heating season has been jeopardized by the mandatory waiting period under section 28(w)(2). Such increased gas deliverability could help prevent a recurrence of last December's heating fuel crunch in some regions of the country. In most cases, the construction permits for the pipelines are conditioned to limit the period during which construction may occur so as to minimize environmental disturbance. Should the construction period for the pipeline run out prior to the expiration of the statutory waiting period for granting the right-of-way, the pipeline company might have to wait until the next calendar year before constructing the pipeline.

Second, the waiting period frustrates the nation's energy policy response to the Persian Gulf crisis. One of the short-term initiatives announced by the Department of Energy has been the displacement of imported oil with domestic natural gas in facilities with dual fuel capability. In many cases such displacement will not occur year round unless new pipelines can be constructed to serve capacity-constrained markets.

Legislative History

S. 3017 was introduce don September 10, 1990, by Senator Johnston on behalf of himself and Senator McClure. At its business meeting on September 19, 1990, the Committee reported S. 3017 favorably.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTES.

The committee, in open business session on September 19, 1990, by a majority vote of a quorum present recommends that the Seante pass S. 3017 as described herein.

The rollcall vote reporting the measure was 18 yeas, 0 nays, as follows:

YEAS	NAYS
Mr. Johnston*	
Mr. Bumpers	
Mr. Ford	
Mr. Bradley	
Mr. Bingaman	
Mr. Wirth	
Mr. Conrad	
Mr. Heflin*	
Mr. Akaka*	
Mr. McClure	
Mr. Hatfield*	
Mr. Domenici*	
Mr. Wallop	
Mr. Murkowski	
Mr. Nickles*	
Mr. Burns	
Mr. Garn*	
Mr. McConnell	

*Indicates voted by proxy.

COMMITTEE AMEMDMENTS

In a technical amendment, the Committee amended S. 3017 to correct references to the Mineral Leasing Act in the title and in the text of the bill. The words "of 1920" were deleted.

SECTION-BY-SECTION ANALYSIS

Section 1 of the bill amends section 28(w)(1) of the Mineral Leasing Act of 1920, as amended, to reflect the abolition of the Senate Committee on Interior and Insular Affairs and its replacement by the Senate Committee on Energy and Natural Resources under the Committee System Reorganization Amendments of 1977.

Section 2 of the bill amends section 28(w)(2) of the Mineral Leasing Act of 1920, as amended, to repeal the requirement that no right-of-way for a pipeline 24 or more inches in diameter may be granted by the Secretary or the appropriate agency head until 60 days after the Secretary or the agency head has notified the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources of his intention to grant the right-of-way. This section also repeals the provision of section 28(w)(2) under which each of the committees may by resolution waive the waiting period. This section retains as parts of section 28(w)(2) the requirements that: (1) the Secretary or agency head must notify the committees upon the receipt of an application for a right-of-way for a pipeline 24 or more inches in diameter; and (2)

the Secretary or agency head may not grant a right-of-way until he has notified the committees of his intention to grant the right-of-way for such a pipeline together with his detailed findings as to terms and conditions that he intends to impose. It is intended that applications for rights-of-way pending on the date of enactment shall no longer be subject to the 60-day waiting period requirement and that in cases where the Secretary or agency head has provided the committees with notice of his intention to issue rights-of-way prior to the date of enactment the 60-day waiting period shall no longer apply.

Cost and Budgetary Considerations

The Congressional Budget Office estimate of costs of this measure has been requested but was not received at the time the report was filed. When the report is available, the Chairman will request it to be printed in the Congressional Record for the advice of the Senate.

Regulatory Impact Evaluation

S. 3017 is not a regulatory measure in the sense of imposing Government-imposed standards of significant economic responsibility on private individuals and businesses. Rather S. 3017 deals solely with the internal administration of Congressional committees and Federal agencies.

No personal information would be collected in administering the statutory changes made by S. 3017. Therefore, there would be no impact on personal privacy.

Little if any additional paperwork would result from enactment of S. 3017.

Changes in Existing Law

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 3017, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

AN ACT TO AMEND SECTION 28 OF THE MINERAL LEASING ACT, AND TO AUTHORIZE A TRANS-ALASKA OIL PIPELINE, AND FOR OTHER PURPOSES

(87 Stat. 576)

TITLE I

Section 101. * * *

"GRANT OF AUTHORITY

"Sec. 28. (a) * * *

* * * * * * *

"REPORTS

"(w)(1) The Secretary and other appropriate agency heads shall report to the [House and Senate Committees on Interior and Insular Affairs] *House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources* annually on the administration of this section and on the safety and environmental requirements imposed pursuant thereto.

[**"(2) The Secretary or agency head shall notify the House and Senate Committees on Interior and Insular Affairs promptly upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until sixty days (not counting days on which the House of Representatives or the Senate has adjourned for more than three days) after a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to terms and conditions he proposes to impose, has been submitted to such committees, unless each committee by resolution waives the waiting period.**]

"(2) The Secretary or agency head shall notify the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources promptly upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to terms and conditions he proposes to impose, has been submitted to such committees.

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